No. 08-1052

In the
Supreme Court of the United States

FAIRBANKS NORTH STAR BOROUGH,

Petitioner,

v.

U.S. ARMY CORPS OF ENGINEERS; JOHN W. PEABODY; and KEVIN J. WILSON,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

REPLY TO OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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INTRODUCTION

Petitioner Fairbanks North Star Borough seeks review of the Ninth Circuit Court of Appeals' decision holding that jurisdictional determinations under the Clean Water Act (CWA), 33 U.S.C. § 1251, *et seq.*, are not subject to judicial review. The arguments against a grant of certiorari advanced by Respondents United States Army Corps of Engineers, *et al.* (Corps), are without merit, for several reasons.

First, the decision below imposes an impossibly high standard for establishing the finality of agency action, by disregarding several significant legal and practical consequences that follow upon a jurisdictional determination. Second, the decision below conflicts with the settled ruled that CWA permits are judicially reviewable, as well as with decisions affirming judicial review of jurisdictional assertions under the Rivers and Harbors Act of 1899, 33 U.S.C. § 401, *et seq.* Moreover, the decision conflicts with this Court's decision in *Leedom v. Kyne*, 358 U.S. 184 (1958), and its progeny. Third, there are prudential reasons why the Borough's jurisdictional determination is ripe for review: it presents issues fit for judicial decision, and the withholding of review would impose a significant hardship on the Borough. The petition should be granted.

ARGUMENT

I

THE DECISION BELOW IMPOSES AN IMPOSSIBLY HIGH STANDARD FOR ESTABLISHING "FINAL AGENCY ACTION," DEPRIVING LANDOWNERS THROUGHOUT THE WEST OF THE RIGHT OF JUDICIAL REVIEW, AND THEREFORE RAISING AN IMPORTANT LEGAL QUESTION MERITING THIS COURT'S REVIEW

The Ninth Circuit's decision below, holding that CWA jurisdictional determinations are judicially unreviewable because they create no legal rights or obligations, radically misapplies this Court's finality jurisprudence to the point that review is merited. The Corps attempts to justify the Ninth Circuit's decision by dismissing the significant legal and practical consequences that flow from a jurisdictional determination. The Corps' arguments are without merit. More importantly, if the Corps' and the Ninth Circuit's understanding of administrative finality is allowed to stand, landowners' rights of judicial review will be seriously compromised.

A. A Jurisdictional Determination Creates the Possibility of an Estoppel Defense

Dismissing the creation of an estoppel defense as a ground for finality, the Corps contends that this Court has not definitively accepted the proposition that the government may be estopped. *See* Corps Br. at 8. But the Corps' argument ignores that this very question—whether estoppel lies against the

government—is itself an issue worthy of this Court's review and justifies the granting of certiorari. *See Office of Pers. Mgmt. v. Richmond*, 496 U.S. 414, 423 (1990) ("We leave for another day whether an estoppel claim could ever succeed against the Government."). Moreover, the Corps ignores its own Regulatory Guidance Letter No. 08-02, discussed in the amicus brief of National Association of Home Builders (NAHB). *See* NAHB Br. at 13-15. The letter expressly states that a jurisdictional determination "can be used and relied on by the recipient of the approved [jurisdictional determination] . . . if a CWA citizen's lawsuit is brought in the Federal Courts against the landowner." *Id.* at 14. Hence, whether or not estoppel may lie against the government, even the Corps acknowledges that a jurisdictional determination can be used defensively by its recipient against a non-federal litigant. Surely, that relief ought to be enough to make the determination "final agency action," yet by the logic of the decision below and the Corps, such a determination cannot be judicially reviewed.

B. A Jurisdictional Determination Can Subject a Landowner to the CWA Permitting Regime, and Create Significant Coercive Effect

The Corps argues that forcing a landowner to apply for a permit cannot make an otherwise nonfinal agency decision judicially reviewable. Relatedly, the Corps contends that a jurisdictional determination does not subject its recipient to any duty, because all legal obligations flow ultimately from the statute

itself.[1] *See* Corps Br. at 9-10. But as the amicus brief of the State of Alaska explains, *see* Alaska Br. at 8-13, because the text of the CWA and its implementing regulations is so vague, a landowner cannot fairly be put on notice of his property's subjection to the CWA until the Corps makes a site-specific determination. *See id.* at 12 ("When the statute's applicability is unrecognizable to a landowner without a declaration from the Corps, the statute has legal force only through that declaration."). It is the jurisdictional determination itself by which "'obligations have been determined,'" and from which "'legal consequences will flow.'" *Bennett v. Spear*, 520 U.S. 154, 178 (1997) (quoting *Port of Boston Marine Terminal Ass'n v. Rederiaktiebolaget Transatlantic*, 400 U.S. 62, 71 (1970)). *See also* NAHB Br. at 6 ("Thus, a landowner's legal rights and obligations are 'fairly traceable' to the Corps's issuance of an approved [jurisdictional determination].") (quoting *Bennett*, 520 U.S. at 170-71).

The Corps also completely ignores the tremendous coercive effect that a jurisdictional determination can have. As NAHB notes, *see* NAHB Br. at 8, the reasoning of the lower court and of the Corps represents a departure from *Bennett*, in which this Court acknowledged that some government action,

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[1] The Corps' reliance on *FTC v. Standard Oil Co.*, 449 U.S. 232 (1980), is misplaced. Although the Court there held that the burden of submitting to an agency administrative proceeding could not convert the administrative complaint into a final agency action, *see id.* at 239-43, the case is distinguishable because the relevant administrative proceeding here—the jurisdictional determination process—has concluded. Nothing in *Standard Oil* suggests that the company could not seek review of the administrative adjudication *following* its completion, *cf. id.* at 244-45, which is what the Borough seeks here.

although not necessarily legally binding, can through coerciveness function as the equivalent of binding action. *See Bennett*, 520 U.S. at 169 (noting that a biological opinion issued under the Endangered Species Act, 16 U.S.C. § 1531, *et seq.*, "theoretically serves an 'advisory function' [but] in reality has a powerful coercive effect" (citation omitted)).

As Alaska observes, *see* Alaska Br. at 20-23, a jurisdictional determination can be exceptionally burdensome by requiring expensive and time-consuming mitigation efforts if a permit is pursued. NAHB further details a number of negative effects attendant upon a jurisdictional determination: loss in property value, additional disclosures to potential buyers, reduction in a project's "green" rating, loss of federal funding, and ineligibility under the National Flood Insurance Program. *See* NAHB Br. at 16-26.

Relying upon the lower court's comparison to the private wetlands consultant, the Corps belittles the persuasive effect of a jurisdictional determination and concludes that a landowner's good faith defense to a CWA civil penalty, *cf.* 33 U.S.C. § 1319(d), cannot be undercut simply by the existence of a jurisdictional determination. But the Corps gives no consideration to the deference that the agency's resolution of the complicated and sophisticated scientific issues presented in a jurisdictional determination would receive from a court. *See* Alaska Br. at 13-16.

All of these effects combine to create a strong coercive force on the landowner either to abandon the project or to expend considerable time and money to seek a permit, based upon the outcome of a jurisdictional determination. The Corps' blinkered review of these effects confirms that the Ninth Circuit's

finality analysis departs from *Bennett* and raises an issue of signal importance for this Court's review.

II

THE DECISION BELOW CONFLICTS WITH THE DECISIONS OF OTHER COURTS OF APPEALS, AND THEREFORE MERITS THIS COURT'S REVIEW

A. The Decision Conflicts with Those Cases Holding That Permitting Decisions Are Judicially Reviewable

The Corps argues that there is no conflict between the decision below and the established proposition that permit decisions are judicially reviewable, *see* Corps Br. at 11-12, but the Corps offers no convincing response to the Borough's permit analogy. The Corps attempts to distinguish a jurisdictional determination as an "advisory opinion." *Id.* at 12. But that litigation description cannot be reconciled with the Corps' regulatory descriptions. For example, in the Regulatory Guidance Letter discussed above and cited in NAHB's brief, the Corps asserts that a jurisdictional determination can be relied upon by the landowner for five years, and can be used by him defensively against a private-party litigant. *See* NAHB Br. at 14. Such are hardly the effects of an advisory document.

Moreover, as the Borough noted in its petition, if a jurisdictional determination denying jurisdiction can be used defensively (as the Corps admits), then the alleged *wrongful* issuance of a jurisdictional determination finding jurisdiction should be judicially reviewable. *See* Pet. at 16-18. The Corps acknowledges that a permit denial is reviewable

because "it foreclose[s] that avenue by which an individual can discharge pollutants." Corps Br. at 12. Yet the same is true analogously with a jurisdictional determination, which can provide a landowner with an estoppel defense against either a governmental or private litigant.

B. The Decision Conflicts with Those Cases Holding That Determinations Under the Rivers and Harbors Act Are Judicially Reviewable

In its amicus brief, NAHB demonstrates that the decision below conflicts with those cases engaging in judicial review of the Corps' determination that a given waterbody is a traditional navigable water—the predicate for Corps jurisdiction under the Rivers and Harbors Act. *See* NAHB at 9-13. Just as the existence of a permitting regime under the Rivers and Harbors Act did not preclude those courts from immediately addressing the Corps' jurisdictional finding, so too the existence of the CWA permitting regime should not preclude judicial review of a CWA jurisdictional determination.

The Corps argues that these Rivers and Harbors Act cases are inapposite because they do not concern the CWA, and because the issue of final agency action was not raised. *See* Corps Br. at 7 n.2. Neither argument has merit. First, the Corps raises a distinction without a difference. Both the CWA and the Rivers and Harbors Act have permitting regimes, and both predicate Corps jurisdiction on the existence of certain types of waters. Thus, the reasons for and against immediate judicial review of the predicates for Rivers and Harbors Act jurisdiction are identical to those for and against review of jurisdictional

determinations. Second, the Rivers and Harbors Act cases expressly observed that the agency determinations there at issue were reviewable under the Administrative Procedure Act. *See, e.g., Lykes Bros., Inc. v. U.S. Army Corps of Eng'rs*, 64 F.3d 630, 633 (11th Cir. 1995); *Loving v. Alexander*, 548 F. Supp. 1079, 1081-82 (W.D. Va. 1982), *aff'd*, 745 F.2d 861 (4th Cir. 1984).

C. The Decision Conflicts with *Leedom* and Its Progeny

In *Leedom*, this Court held that an otherwise nonfinal agency action can be judicially reviewed if to decline judicial review would result in the evisceration of the rights of the one seeking review. 358 U.S. at 189-90. The Seventh Circuit in *Rueth v. United States Environmental Protection Agency*, 13 F.3d 227 (7th Cir. 1993), applying the *Leedom* doctrine to the CWA context, concluded that judicial review of an otherwise unreviewable CWA enforcement order could be had in the face of a complete overextension of agency authority. The Ninth Circuit's decision below rejecting review of jurisdictional determinations conflicts with *Leedom* and *Rueth*.[2]

The Corps' attempts to distinguish *Leedom* and *Rueth* fail. The Corps contends that it has not

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[2] The Corps contends without merit that this conflict was not raised below. *See* Corps Br. at 12-13. Although *Leedom* and *Rueth* were discussed in a portion of the Borough's appellate brief addressing whether the CWA affirmatively precludes judicial review of jurisdictional determinations, the actual argument advanced therein—judicial review is compelled to preserve the Borough's rights in the face of the Corps' complete overextension of authority—is identical to that advanced here as a basis for this Court's review.

overextended its authority. But this self-serving observation runs directly contrary to Alaska's view that the substance of the jurisdictional determination here challenged—that permafrost can be regulated under the CWA—threatens to subject much of the state's property to federal control. *See* Alaska Br. at 1-3. The Corps argues that the challenged jurisdictional determination does not assert anything in a binding manner. *See* Corps Br. at 14. Yet that characterization conflicts with the Corps' own description of the jurisdictional determination as "final agency action," *see* 33 C.F.R. § 320.1(a)(6), and its description of the determination's effects in its Regulatory Guidance Letter, *see* NAHB Br. at 14. The Corps blithely contends that the jurisdictional determination does not require the Borough to forfeit any right, *see* Corps Br. at 14, but in so contending, the Corps ignores the determination's coercive force as well as the fundamental constitutional right to own and to use property. *Cf. The Civil Rights Cases*, 109 U.S. 3, 22 (1883) (observing that among "those fundamental rights which are the essence of civil freedom [is] . . . the . . . right to inherit, purchase, lease, sell, and convey property"). Finally, the Corps seeks to create a distinction between the procedure of issuing a jurisdictional determination (a procedure which is not here challenged), and the substance of that determination. *See* Corps Br. at 15. But to allow the Corps to hide its substantive errors behind its procedural blamelessness would drain *Leedom* and *Rueth* of all significance.

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The decision below conflicts with the rule that permitting decisions are reviewable, with the River and Harbors Act cases, and with *Leedom* and its progeny. This Court should grant the petition.

III

PRUDENTIAL CONCERNS WARRANT REVIEW OF THE BOROUGH'S JURISDICTIONAL DETERMINATION

The Corps argues that the Borough's jurisdictional determination is not ripe for review, because the Borough can always seek a permit. *See* Corps Br. at 15-16. The argument is without merit.

The Borough's jurisdictional determination is ripe because the issues presented therein are fit for judicial decision, and hardship would befall the Borough if judicial review were withheld. *See Nat'l Park Hospitality Ass'n v. Dep't of Interior* 538 U.S. 803, 808 (2003). The Corps determined that the Borough's property qualifies as wetlands under its Wetlands Manual, and also constitutes waters of the United States under the CWA. Further, the Corps completed its regulatory obligation to rule upon the Borough's request for a jurisdictional determination, the Borough has exhausted all administrative appeals, and thus no additional factual development of the record is possible.

It is true that physical circumstances may change, and so too the Corps' jurisdictional determination. Also, the Borough can still apply for a permit. But if those points were sufficient to deny review of the jurisdictional determination, they also would be sufficient, as noted above, to deny judicial review to permit decisions. If the ability to apply for another permit were sufficient to defeat judicial review, then permit denials would never be reviewable, because an applicant is not precluded from seeking another permit following a permit denial. And as documented by the Borough's amici, *see* Alaska Br. at 19-24; NAHB Br. at 16-26, the significant cost and delay associated with applying for and obtaining a CWA permit[3] more than adequately establish hardship sufficient to justify judicial review.

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[3] *Rapanos v. United States*, 547 U.S. 715, 719 (2006) (plurality opinion) ("The average applicant for an individual permit spends 788 days and $271,596 in completing the process, and the average applicant for a nationwide permit spends 313 days and $28,915-not counting costs of mitigation or design changes." (citing David Sunding & David Zilberman, *The Economics of Environmental Regulation by Licensing: An Assessment of Recent Changes to the Wetland Permitting Process*, 42 Nat. Resources J. 59, 74-76 (2002)).

CONCLUSION

For the foregoing reasons, the petition should be granted.

DATED: May, 2009.

Respectfully submitted,

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